In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1102

UNITED STATES OF AMERICA, APPELLANT

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

While the government's position on the merits is adequately set forth in our jurisdictional statement, we think it desirable to reply to appellees' assertion that the case is moot.

Appellees' suggestion of mootness (Motion, pp. 13–17) is based upon the fact that on January 1, 1967—some eight months before the district court's decision was announced—an AID regulation (22 C.F.R. 201.52(a)(7) (1967 Rev.)) became effective which precludes Webb-Pomerene associations from bidding on "U.S.-source only" procurements, *i.e.*, those on which the material cannot be supplied from foreign sources.

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Appellees also point out (Motion, pp. 4, 20) that on December 28, 1967, they dissolved the Concentrated Phosphate Export Association.

It was stipulated, however, that the procurements involved in this case were not restricted to "U.S. source only." Moreover, although the great bulk of recent AID procurements of fertilizer have in fact been from domestic sources (AID Operations Report (1967), p. 74)—as were the procurements in this case—this is not the same as "U.S.-source only" procurement. Not all procurements have been so restricted nor can it be assumed that they will be.[1] Thus, the members of the dissolved association, which were individually named as defendants, may resume concerted Webb-Pomerene bidding on all procurements not limited to U.S. sources whenever they deem it profitable to do so.

On these facts, a live controversy—whether the Webb-Pomerene exemption applies to government procurement activities—continues to exist between the government and appellees. If this Court notes probable jurisdiction and reverses on the merits, the government would be entitled to relief designed to preclude appellees from resuming Webb-Pomerene bidding on government procurements. The case is therefore not moot.[2]

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[1] In addition, AID's recent regulation remains subject to modification. AID may take such action in response to the urging of groups such as appellees, who could rely on the district court's decision that the Webb-Pomerene exemption applies to foreign aid procurement. Such groups also might institute an action challenging the validity of the regulation, relying at least in part on the holding of the district court.

[2] Appellees' statement (Motion, p. 4, n. 4) that the district judge declined to vacate his judgment "[f]or procedural rea-

Appellees' reliance upon *United States* v. *W. T. Grant Co.*, 345 U.S. 629, is misplaced. In *Grant*, after the government filed suits challenging interlocking directorates under Section 8 of the Clayton Act, the interlocks were terminated; the district court, without deciding the merits, dismissed the suits on the ground there was no likelihood of future violation by the defendants. This Court, although holding that the case was not moot (*id.* at 632–633), affirmed on the ground that the district court had not abused its discretion in concluding that there was no "cognizable danger of recurrent violations" (*id.* at 633). The present case is the exact opposite of *Grant*: here the district court decided there was no violation, and thus did not consider the need for relief. Thus, the district court here never exercised any discretion in determining whether relief was necessary and, as we have shown, the government would be entitled to relief if this Court agrees with us on the merits.

More in point is *United States* v. *Freight Association*, 166 U.S. 290. In that case the government charged an association of railroad companies with violating the Sherman Act by fixing rates, allocating business and acting in concert to meet outside competition. The complaint sought dissolution of the association and an injunction against further concerted activity. After a hearing on the merits, the suit was dismissed. Nevertheless, the association dissolved and announced that it was terminating all concerted

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sons" is inaccurate. He advised the parties that he did not regard the jointly proposed order favorably since it was his view that he had decided a substantial question that warranted resolution on the merits.

activity. This Court rejected the defendants' contention that the government's appeal should be dismissed because the association had been dissolved. Noting that the defendants could easily form another association, the Court held that "the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit" (166 U.S. at 309.). See also *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43; *Walling* v. *Reuter*, 321 U.S. 671, 673–674; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257, 260.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] If, however, the Court should conclude that the case is moot, we suggest that it follow its usual practice by vacating the judgment below and remanding with instructions to dismiss the complaint as moot. *United States* v. *Munsingwear*, 340 U.S. 36, 39. Compare Motion, p. 17, n. 19.

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